Filed 12/6/16 P. v. Cruz-Sanchez CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. NAZARIO ENRIQUE CRUZ-SANCHEZ, Defendant and Appellant.	D070693 (Super. Ct. No. 12CF0810)

APPEAL from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Sharon L. Rhodes and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Nazario Enrique Cruz-Sanchez of two counts of sexual intercourse or sodomy with a child 10 years old or younger (Pen. Code,[1] § 288.7, subd. (a); counts 1, 2), four counts of oral copulation or sexual penetration with a child 10 years old or younger (§ 288.7, subd. (b); counts 3-6), and two counts of a lewd act on a child under 14 years of age (§288, subd. (a); counts 7, 8). The jury also found that Cruz-Sanchez committed lewd acts against more than one victim (§ 667.61, subds. (b), (c), (e)(4)).

The superior court sentenced Cruz-Sanchez to prison for 70 years to life.

Cruz-Sanchez appeals, contending his statements to the police that one of the victims twice touched his penis were coerced. We affirm.

FACTUAL BACKGROUND

Prosecution

In September 2006, 12-year-old A.J. came to the United States from Mexico to live with her mother and Cruz-Sanchez in Santa Ana. Beginning in January 2007, Cruz-Sanchez began behaving inappropriately towards A.J. For example, one day, as A.J. was getting ready for school, Cruz-Sanchez told her that he was going to teach her how to put a condom on and he demonstrated by putting a condom on a bottle. Then Cruz-Sanchez pulled his pants down and tried to get A.J. to watch him put a condom on his penis.

In May 2007, Cruz-Sanchez woke A.J. up in the middle of the night and took her from the bedroom to the living room. He asked her, "Do you know what it's like to have

---

1 Statutory references are to the Penal Code unless otherwise specified.

a man make you feel good?" Cruz-Sanchez then began rubbing A.J.'s upper leg and vagina in a circular motion over her pajamas for three to five minutes.

On another occasion in May 2007, Cruz-Sanchez came into the bedroom when he thought A.J. was sleeping and put her hand on his penis. Cruz-Sanchez rubbed his penis against A.J.'s hand and she could feel it getting erect.

Also, in June 2007, Cruz-Sanchez came into the bedroom while A.J. was getting ready for school and playfully threw her onto the bed. He got on top of her for about 30 seconds with his penis against her vagina over the clothing, and tapped her vaginal area about five to 10 times.

In early 2011, Cruz-Sanchez began dating a woman named E.G. E.G. had a six-year-old son, J.G., and an eight-year-old daughter, D.G. Around February 2011, E.G. and her children moved into an apartment with Cruz-Sanchez in Santa Ana. They all shared a single bedroom, but J.G. would often spend weekends away visiting his father.

After they moved in together, Cruz-Sanchez told E.G. that, in his religion, D.G., was expected to be his "young lady" and that, as his "young lady," D.G. had to touch his penis. Cruz-Sanchez threatened to withhold financial support from E.G. if she did not allow this improper relationship. E.G. watched Cruz-Sanchez tell D.G. what he wanted her to do, and then saw D.G. masturbate Cruz-Sanchez's exposed, erect penis for about five minutes. Another time, E.G. made D.G. suck Cruz-Sanchez's penis while E.G.

watched.[2] When E.G. left to take a shower, Cruz-Sanchez applied lubricant to his penis and to D.G.'s vagina by placing his finger inside, and then had intercourse with D.G. until he ejaculated on her shirt.

In all, E.G. made D.G. orally copulate Cruz-Sanchez at least 30 times. D.G. also was forced to take pictures of Cruz-Sanchez and E.G. engaged in sex acts and to watch pornography on the computer.[3]

Outside of E.G.'s presence, Cruz-Sanchez regularly had vaginal and anal intercourse with D.G., put his mouth on her vagina, and touched her breasts. The abuse continued for over a year.

However, on March 15, 2012, D.G. told her friend about what E.G. and Cruz-Sanchez were making her do. The next day, the friend told the school principal and, after speaking with D.G., the school principal called the police.

The police interviewed Cruz-Sanchez the next day. Cruz-Sanchez told the police that, about a year earlier, he got drunk and made D.G. touch his penis twice on consecutive days because D.G.'s father had supposedly been asking D.G. about the size of Cruz-Sanchez's penis. Except for that admission, Cruz-Sanchez denied any other improper contact with D.G.

---

2 In a separate proceeding, E.G. pled guilty to child sex abuse charges and agreed to testify against Cruz-Sanchez in exchange for a prison sentence of 20 years.

3 Although there was testimony that E.G. photographed D.G. performing sex acts on Cruz-Sanchez, the pictures were not recovered, and as such, were not offered as exhibits or evidence at trial.

Defense

D.G. previously informed police she told an aunt about the abuse and that she slept in a separate bedroom from Cruz-Sanchez and E.G., and did not report any digital penetration or anal sex. Although D.G. testified she told J.G. about the abuse, J.G. denied that D.G. ever told her anything about it. In statements to a social worker, D.G. denied performing oral sex on Cruz-Sanchez and stated J.G. was in the room when the abuse occurred.

A doctor testified that, based on D.G.'s description of the abuse, he would expect to find damage to her hymen, which would be visible even after it healed. The doctor reviewed the examination of D.G. and opined that repeated acts of intercourse "could not have happened" based on the physical findings.

A.J.'s mother, testified that A.J. was angry about moving to the United States and had behavioral issues. In 2008, A.J. accused Cruz-Sanchez of hitting her, resulting in a visit from a social worker and court-mandated family therapy. A.J.'s mother was unaware of any inappropriate sexual touching. She became involved with Cruz-Sanchez's religion, but Cruz-Sanchez never criticized her for not being a virgin or told her A.J. should be his "maiden."

Cruz-Sanchez's trial counsel played additional portions of Cruz-Sanchez's interviews with police, in which he repeatedly denied having sex with D.G. and asked police to conduct a medical examination of D.G. to exonerate him.

Cruz-Sanchez testified at trial. He denied touching A.J. inappropriately or showing her how to use a condom. Cruz-Sanchez discussed an incident where he

playfully picked up A.J. and set her on the bed while celebrating her good grades, but he did not lay on top of her. Cruz-Sanchez also denied yelling at E.G. for not contributing to the family, and he claimed that he never told her D.G. needed to be his "maiden." After the kids would visit J.G.'s father, they would say Cruz was not their father and be rude to him. J.G. began asking about Cruz-Sanchez's penis. Cruz-Sanchez told police D.G. touched his penis because he was trying to protect E.G., and believed it was what the officers wanted to hear. Cruz-Sanchez denied any sexual misconduct.

DISCUSSION

I

CRUZ-SANCHEZ'S STATEMENTS TO THE POLICE

Cruz-Sanchez maintains that his convictions should be reversed because the police coerced his statements that he had D.G. touch his penis while he was drunk. We disagree.

A. Background

In the early morning of March 17, 2012, Cruz-Sanchez returned to his apartment from work. E.G. and her children were not there and the apartment was a "disaster" with the closet open, clothes on the bed, and the area where the computer was kept "was all messed up." Cruz-Sanchez asked a neighbor what had happened, and she told him that a police officer took E.G. and the children away. Cruz-Sanchez called 9-1-1 a couple of times and eventually was picked up by a police officer and taken to the police station.

Cruz-Sanchez was first interviewed by Officer Robert Guidry. The interview began at 4:51 a.m., and Cruz-Sanchez indicated that he had fallen asleep while waiting.

The interview was conducted in English. Guidry told Cruz-Sanchez he was not under arrest, but he wanted to ask him some questions. He told Cruz-Sanchez that Cruz-Sanchez did not have to talk to him if he did not want to do so. Guidry proceeded to provide Cruz-Sanchez with a *Miranda*[4] warning, after which, there was a bit of confusion regarding whether Cruz-Sanchez wanted to talk to Guidry. However, Cruz-Sanchez confirmed twice that he wanted to talk to Guidry. Thus, Guidry proceeded to question Cruz-Sanchez.

Guidry falsely told Cruz-Sanchez that the police found pictures of him with his penis in D.G.'s mouth. Cruz-Sanchez denied that he ever had any type of sex with D.G. whether oral or otherwise. The interview concluded at 5:35 a.m. and lasted 44 minutes.

About 25 minutes later, Guidry resumed interrogating Cruz-Sanchez. The interrogation was in English and Guidry told Cruz-Sanchez the police had pictures of Cruz-Sanchez having sex with E.G. Cruz-Sanchez remained adamant that he did not abuse D.G. Guidry also asked Cruz-Sanchez whether D.G. had taken pictures of E.G. and Cruz-Sanchez having sex. Cruz-Sanchez denied this accusation. There is no indication in the transcript regarding the length of this interview, but based on a comparison of the length of the transcript of this interview with the transcript of the first interview, the People suggest the interview lasted about 22 minutes. Cruz-Sanchez does not challenge this estimation.

---

4 *Miranda v. Arizona* (l966) 384 U.S. 436.

In the next interview, Guidry was joined by Corporal Martinez. Martinez conducted the interview, which was predominately in Spanish. Martinez told Cruz-Sanchez that E.G.'s statement and D.G.'s statement were the same about the abuse. Cruz-Sanchez denied that he ever abused D.G. Before concluding this interview, Martinez told Cruz-Sanchez that he was "screwed" if the only story told to the police was from E.G. and D.G. In addition, Martinez asked Cruz-Sanchez to "[t]hink about whether you will help yourself or not, okay?" Martinez left the room shortly after making these statements. There is no indication in the record regarding the length of this interview, but, based on the length of the transcript, the People suggest the interview lasted about 12 minutes. Cruz-Sanchez did not take issue with this estimation.

The fourth interview was short and in Spanish.[5] During that interview, Cruz-Sanchez again insisted that he never abused D.G. and asked the police to have a medical examination conducted on D.G. After Cruz-Sanchez told the officer that he had already given his statement, the officer responded by telling Cruz-Sanchez that it was his "chance to . . . state [his] defense" and "[t]he only one who can help you is yourself."

The next interview was limited to biographical information about Cruz-Sanchez.

The sixth interview occurred as officers took Cruz-Sanchez from the "police building" to the jail. This brief interview was conducted in Spanish, and the People estimate it lasted about 10 minutes. During that interview, Cruz-Sanchez admitted to having an impotency problem for the past five years and that D.G. might have seen him

---

5 The People estimate the interview lasted about five minutes.

and E.G. having sex. However, Cruz-Sanchez remained adamant that he never touched D.G. in a sexual manner.

The seventh and final interview began at 1:50 p.m. and lasted 85 minutes. Detective Jamie Rodriguez conducted the interview in Spanish. At the beginning of the interview, Cruz-Sanchez stated that he was comfortable and did not need to use the bathroom. Rodriguez again advised Cruz-Sanchez of his *Miranda* rights. After receiving his *Miranda* warning this second time, Cruz-Sanchez told Rodriguez that he wished to talk to him.

Cruz-Sanchez again denied that he ever touched D.G. He also added that he never touched A.J. either. Rodriguez told Cruz-Sanchez that E.G. and D.G. had told the police what happened, and the police had "the proof on the computer and the camera." Shortly thereafter, during the interview, Cruz-Sanchez stated that D.G. had twice touched his penis when he was drunk. Rodriguez later told Cruz-Sanchez that his DNA had been found inside D.G. Rodriguez also told Cruz-Sanchez that D.G. told the police that she had performed oral sex on Cruz-Sanchez 30 times, he had put his penis inside her vagina about 20 times, and his finger in her vagina 10 times. Nevertheless, Cruz-Sanchez maintained that he never touched D.G. sexually.

Before trial, Cruz-Sanchez moved to exclude his statements to the police. After reviewing the transcripts of the interviews, considering the papers, and entertaining oral argument, the trial court denied the motion. Cruz-Sanchez's statements to the police were admitted at trial with the audio of his seventh interview played for the jury.

B. Law

When a defendant challenges the admission of his or her statements on the ground they were involuntarily made, the prosecution must prove by a preponderance of the evidence the statements were, in fact, voluntary. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1093.) A statement is involuntary if it is "not ' "the product of a rational intellect and a free will." ' " (*Mincey v. Arizona* (1978) 437 U.S. 385, 398 (*Mincey*).) The court in making a voluntariness determination "examines 'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession." (*Dickerson v. United States* (2000) 530 U.S. 428, 434 (*Dickerson*).)

Here, we note that Cruz-Sanchez does not claim that he was not properly given a *Miranda* warning or he did not voluntarily waive his *Miranda* rights. Indeed, it is undisputed that officers here gave Cruz-Sanchez his *Miranda* warning twice, once in English and later in Spanish.

We make this observation because the United States Supreme Court, in *Miranda*, in prescribing the type of information a defendant should be provided before a custodial interrogation, focused on the inherently coercive nature of that type of interrogation. (See *Berkemer v. McCarthy* (1984) 468 U.S. 420, 428; *People v. Webb* (1993) 6 Cal.4th 494, 525-526 ["*Miranda* requires that a suspect be given certain advisements to preserve the privilege against self-incrimination, or to ensure its voluntary and intelligent waiver, during the inherently coercive circumstances of a 'custodial interrogation.' "].) Thus, it is accepted under both federal and California law, that a police interrogation of a suspect in custody is fundamentally coercive. It logically follows that, after a suspect voluntarily

waives his or her *Miranda* rights, coercive police tactics by themselves do not render a defendant's statements involuntary if the defendant's free will was not in fact overborne by the coercion and his decision to speak instead was based upon some other consideration. (*Colorado v. Connelly* (1986) 479 U.S. 157, 167; *People v. Maury* (2003) 30 Cal.4th 342, 404-405.) Therefore, the determination whether the authorities improperly coerced a defendant's statement involves an evaluation of the totality of the circumstances, including the nature of the interrogation and the circumstances relating to the particular defendant. (*Dickerson, supra,* 530 U.S. at p. 434.)

C. Analysis

Here, Cruz-Sanchez claims his statements were the product of coercion because: (1) the officers made implied threats and promises, (2) the officers repeatedly lied to him; (3) he was interrogated seven times over 12 hours; and (4) he had been awake for over 24 hours. We disagree.

Cruz-Sanchez insists his statements were coerced because he was told at "numerous points" "to 'help himself' by confessing" as well as he was " 'screwing' himself by maintaining his innocence." Citing *People v. Neal* (2003) 31 Cal.4th 63 (*Neal*), Cruz-Sanchez characterizes the officer's words as implied promises of leniency or implied threats. His reliance on *Neal* is misplaced.

In *Neal, supra*, 31 Cal.4th. 63, the interviewing officer made explicit threats for failure to cooperate and promises of leniency for cooperation.[6] (*Id*. at pp. 81-85.) In *People v. Holloway* (2004) 33 Cal.4th 96 (*Holloway*), in contrast, the court held that a detective did not cross the line "by mentioning a possible capital charge or suggesting that defendant might benefit in an unspecified manner from giving a truthful, mitigated account of events." (*Id*. at p. 117.) To the extent the detective implied that a blackout or accident defense might help the defendant avoid the death penalty, "he did no more than tell defendant the benefit that might 'flow[ ] naturally from a truthful and honest course of conduct. . . .' " (*Id*. at p. 116.)

In *People v. Maestas* (1987) 194 Cal.App.3d 1499, the court likewise rejected the defendant's contention that his confession had been induced by threats. The court explained that "the gist of the comments cited by [the defendant] was not that he would be punished for not confessing but that his concealment of the identity of the person who shot the victim tended to reflect negatively on the extent of his involvement. The comments explain the possible consequences, depending upon his motivations and involvements in the shooting, and as such do not constitute 'threats' or 'false promises of leniency.' " (*Id*. at pp. 1506-1507, fn. omitted.)

---

6 In *Neal, supra*, 31 Cal.4th 63, the detective told the defendant that if he did not confess, "the system is going to stick it to you as hard as they can" and he would be "[c]harge[d] with a heavier charge" like "first degree murder or whatever." (*Id*. at p. 81.) The detective also promised the defendant that if he did confess, the detective would make the defendant's situation "as best as I can for you." (*Ibid*.)

Here, the subject remarks were ambiguous and, in context, were more like those found unobjectionable in *Holloway, supra,* 33 Cal.4th 96 and *Maestas, supra,* 194 Cal.App.3d 1499 than like those condemned in *Neal, supra,* 31 Cal.4th 63. For example, the statement that Cruz-Sanchez could "help himself," at most, "simply informed [Cruz-Sanchez] that full cooperation might be beneficial in an unspecified way." (*People v. Carrington* (2009) 47 Cal.4th 145, 174.) Indeed, Cruz-Sanchez does not point to anything the officers actually offered him beyond the general assertion that he would help himself by confessing. In other words, there was no specific benefit promised. (See *People v. Mayfield* (1993) 5 Cal.4th 142, 176 ["[T]here was no inducement that might have made defendant's statement involuntary as a matter of law: the police did not offer defendant anything."]; *Holloway, supra,* at p. 117 [finding no promise of leniency where "[n]o specific benefit in terms of lesser charges was promised or even discussed"].)

Likewise, we are not persuaded that statements to the effect that Cruz-Sanchez would be screwed if he did not confess are sufficient threats to support a finding of coercion. Such statements are no different than telling a defendant that it would be worse to lie in light of the evidence against him or that a jury would be more impressed by a confession and remorse than demonstrably false denials. (See *People v. Carrington, supra,* 47 Cal.4th at p. 174; *People v. Williams* (2010) 49 Cal.4th 405, 444.)

Cruz-Sanchez next argues his statements were coerced because the officers and/or detectives repeatedly lied to him. They did. Officers and detectives who questioned Cruz-Sanchez told him multiple times that they had pictures of him engaging in sex acts with D.G. No such pictures were possessed by the police.

Generally, a confession or admission obtained by subterfuge or deceit may nevertheless be admissible, so long as the subterfuge or deceit is not a type that is reasonably likely to produce a false statement. (*People v. Williams, supra*, 49 Cal.4th at p. 443.) Here, it is clear that the mention of the pictures with D.G. did not overcome Cruz-Sanchez's will.

During the first interview, Guidry told Cruz-Sanchez that the police had pictures of D.G. sucking on Cruz-Sanchez's penis. Nevertheless, Cruz-Sanchez steadfastly denied that he ever had oral sex with D.G. Indeed, he denied ever sexually abusing D.G. in any manner.

Some six hours later, during the seventh interview, Rodriguez told Cruz-Sanchez the police had recovered whatever pictures were on the camera and the computer. Rodriguez did not say specifically if any sex acts with D.G. appeared in the pictures. Cruz-Sanchez subsequently admitted that he had made D.G. touch his penis on two occasions when he was drunk. After his admission, Rodriguez then implied to Cruz-Sanchez that he had seen pictures of D.G. sucking on Cruz-Sanchez's penis. But Cruz-Sanchez continued to deny that D.G. ever performed oral sex on him. (See *People v. Williams, supra*, 49 Cal.4th at p. 444 ["Significantly, . . . defendant did not incriminate himself as a result of the officer's remarks."].)

Further, Cruz-Sanchez resisted making any incriminating statements for a considerable period of time. When he did make an incriminating statement, it followed Rodriguez telling him that E.G. and D.G. had already told the police what happened, but Rodriguez wanted Cruz-Sanchez to explain why it happened. Cruz-Sanchez's admission

began with him stating that nothing like what E.G. and D.G. claimed occurred actually occurred, but instead, when he was "very drunk," D.G. touched his penis. He denied any other sexual contact whatsoever with D.G. Thus, despite the lies that the police had pictures of Cruz-Sanchez's penis in D.G.'s mouth, Cruz-Sanchez only admitted to having D.G. touch his penis twice, which pales in comparison to the extensive sex acts that D.G. said occurred, and for which Cruz-Sanchez was convicted. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 58 [defendant's "resistance, far from reflecting a will overborne by official coercion, suggests instead a still operative ability to calculate his self-interest in choosing whether to disclose or withhold information."].)

Also, we are not troubled by Rodriguez's false claim that Cruz-Sanchez's DNA was found in D.G. He made this misrepresentation after Cruz-Sanchez had already admitted the penis touching. Thus, the misrepresentation had no role in convincing Cruz-Sanchez to make his incriminating statements. (See *People v. Rundle* (2008) 43 Cal.4th 76, 119.) Moreover, even after Rodriguez made this misrepresentation, Cruz-Sanchez remained unwavering that he had never touched D.G. in a sexual manner.

In addition, we are not persuaded by Cruz-Sanchez's reliance on *In re Shawn D.* (1993) 20 Cal.App.4th 200 to support his claim that the lies rendered his statements involuntary. In that case, the court did not find the police's deceptive statements overborne the defendant's will. Rather, the court was much more concerned that the police's promises of leniency caused the defendant to confess. (*Id*. at p. 214.)

In short, confessions prompted by deception are admissible as evidence as long as a police officer's misrepresentation is not the kind likely to produce a false confession.

(*People v. Jones* (1998) 17 Cal.4th 279, 299.) "Police officers are thus at liberty to utilize deceptive stratagems to trick a guilty person into confessing. The cases from California and federal courts validating such tactics are legion." (*People v. Chutan* (1999) 72 Cal.App.4th 1276, 1280.) The misrepresentation made here, regarding pictures of D.G. performing oral sex on Cruz-Sanchez and the presence of Cruz-Sanchez's DNA in D.G., were not the type of misrepresentations reasonably likely to and did not coerce a false confession.

Cruz-Sanchez next asserts his statements were involuntary because he was interrogated seven times over a 12-hour period. We conclude this claim is without merit. Unlike the circumstances in *Mincey*, *supra*, 437 U.S. 385 and *Spano v. New York* (1959) 360 U.S. 315 (*Spano*), there was no single interview that lasted many hours, resulting in a confession after the defendant refused to speak. (See *Mincey*, *supra*, at p. 401, [four-hour interrogation of a "seriously and painfully wounded man on the edge of consciousness" that stopped only during those periods when he was unconscious]; *Spano*, *supra*, at p. 322 [eight-hour interrogation at night with only one break while the defendant was moved to a new location for further questioning].) Here, there were a series of interviews, over a 12-hour period, by various officers and a detective, often with significant breaks in between. The longest interview appears to have been 85 minutes. Before that interview began, Cruz-Sanchez was asked if he needed to use the restroom. Cruz-Sanchez indicated that he did not need to and was comfortable. The next longest interview, which was the first, lasted 44 minutes. At the beginning of that interview,

Cruz-Sanchez indicated that he had fallen asleep waiting for the officer. The other interviews seem to have been much shorter.

Notably, in his briefs here, Cruz-Sanchez does not directly address the actual length of the interviews, but instead, refers to them in general terms as having occurred "across approximately 12 hours." He does not point to anywhere in the record suggesting that the police exploited "slow mounting fatigue" resulting from prolonged questioning, or that such fatigue played any role in Cruz-Sanchez making his incriminating statements. (See *Spano, supra,* 360 U.S. at p. 322.) This shortcoming is fatal to his claim.

Similarly, we are not persuaded that Cruz-Sanchez's statements were the product of sleep deprivation as he contends in his opening brief because he had been awake for 24 hours. To the contrary, the record suggests that he slept for a period of time before the first interview. Moreover, he said he was comfortable before the last interview. And toward the end of the last interview, Cruz-Sanchez said that he appreciated Rodriguez's "kindness" and that Rodriguez "treated [him] very well." Put differently, there is no evidence in the record that Cruz-Sanchez was sleep deprived.

In addition, we do not agree with Cruz-Sanchez that his sleep deprivation was exacerbated by the fact that his initial interviews were conducted in English. He only made his incriminating statements after he was interrogated in Spanish.

In conclusion, based on the totality of the circumstances, we conclude that Cruz-Sanchez's incriminating statements were voluntary and not the product of coercion.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.